Filed 6/11/07 In re Marshall R. CA1/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

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| In re MARSHALL R, a Person Coming Under the Juvenile Court Law. | |
| HUMBOLDT COUNTY DEPARTMENT OF HEALTH & HUMAN SERVICES,<br>Plaintiff and Respondent,<br>v.<br>LORI M., et al.,<br>Defendants and Appellants. | A115268<br>(Humboldt County Super. Ct. No. JV040235) |

Lori M. and Peter R. appeal an order terminating their parental rights and releasing seven-year-old Marshall R. for adoption by his paternal grandparents. Both parents assert the juvenile court erred in finding that the child would not benefit from a continued parent-child relationship. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A).)[1] We disagree and affirm the judgment.

## BACKGROUND

On November 10, 2004, investigators from the Humboldt County Department of Health and Human Services (Department) visited Lori's home to investigate why Marshall had received emergency room medical treatment twice in less than two weeks.

[1] All statutory references are to the Welfare and Institutions Code.

On October 12, 2004, Marshall broke his arm when he fell off a broken step stool in Lori's backyard. Afterward, the treating physician expressed concern about discharging him to his mother's care because she appeared to be under the influence of alcohol. Lori took Marshall to the emergency room again on October 23, 2004, after he drank liquid laundry detergent that had been stored inside a soda bottle left open on a dresser in his mother's house. During the November 10 visit, investigators found Lori's house in a filthy, unsanitary and dangerous condition. In the backyard, they found a broken fence with missing boards, black garbage bags ripped open and trash strewn around the yard, a broken jungle gym, and the same broken step stool from which Marshall had fallen. In the house, they found grime and dirt everywhere, dirty dishes and dirty clothes piled high, and boxes of items blocking access to a sliding door.

The Department filed a juvenile dependency petition alleging Marshall had suffered, or was under a substantial risk of suffering, serious physical harm or injury as a result of the parents' failure to supervise or protect. Although Marshall was not detained immediately, the Humboldt County Sheriff's Department placed him in protective custody on February 17, 2005, after deputies who visited Lori's house discovered conditions there that posed a substantial risk to the child of serious physical harm or illness. For example, there were large piles of debris and garbage in the yard and inside the house, a steak knife left lying against a skateboard with the blade facing up, a hot tub with empty soda bottles and beer cans floating in the water, a razor knife, a glass pipe used for smoking controlled substances, partially-filled wine and beer bottles, prescription drug bottles, and a separate garbage-filled trailer. Between April 1998 and February 2005, when Marshall was detained, the Department had received 16 referrals regarding the family alleging general neglect and substantial risk, at least three of which were substantiated. The Department had offered Lori a variety of services in connection with those referrals, including family preservation and public health nurse services, but she failed to participate in them and the cases were closed due to her lack of cooperation.

The Department filed an amended petition adding substance abuse allegations against the parents,[2] and the juvenile court sustained this petition on April 12, 2005. After a contested dispositional hearing, the court declared Marshall a dependent child under section 361, subdivision (c)(1) [substantial danger to physical health, safety, protection, or physical or emotional well-being if minor returned home] and subdivision (c)(2) [minor suffering severe emotional damage] and ordered reunification services for the parents. Marshall was continued in a placement with his paternal grandmother, who had previously been granted de facto parent status. The parents were to be provided supervised visits with Marshall for a minimum of 10 hours per week, and the court stated that the visits could progress to unsupervised with the agreement of the Department and counsel appointed to represent the child. Lori challenged the sufficiency of evidence supporting the dispositional order, but we affirmed the order in an unpublished decision. (*In re. Chevelle M.* (June 29, 2006, A110767) [nonpub. opn.].)[3]

The six-month review hearing was held in December 2005. The Department's report noted the parents had made little progress on their case plans. Although the Department had offered Lori and Peter a variety of services over the past several years, they had once again failed to engage in services.

In a report prepared for the 12-month review hearing, the Department recommended that reunification services for Lori and Peter be terminated. The court appointed special advocate (CASA) for Marshall concurred in this recommendation. Except for visiting their son, the parents had failed to comply with their case plans. Lori was living in a trailer, but she moved it often and the social worker had difficulty finding her. Peter lived in the trailer "off and on" and was also difficult to reach. Lori completed a substance abuse evaluation, but she was discharged from the program because she

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[2] Peter was granted presumed father status on January 18, 2005.

[3] The court's orders concerned both Marshall and his older half-sister Chevelle M., another child of Lori's who was detained in February 2005. Chevelle was placed in her father's home, and he was provided family maintenance services. This appeal does not challenge any rulings with respect to Chevelle.

failed to keep appointments to enter treatment. Peter did not even complete the evaluation application. Lori admitted she had not attended the counseling required by her case plan, and Peter steadfastly refused to participate in counseling. Nevertheless, the parents had arrived for most of their twice-weekly scheduled visits with Marshall, although they missed six visits (and failed to call for five of these six). All visits were supervised, and the grandmother expressed an opinion that supervised visitation, as opposed to unsupervised, was beneficial for the child. Marshall missed his parents, and the grandmother believed the child was closely bonded to his father, but Marshall also said he liked living in his grandparent's home. The Department noted that the grandparents had engaged in all recommended services, and Marshall was thriving in their care. The grandparents expressed a willingness to adopt; however, recognizing the value of parental involvement, they intended to allow Lori and Peter to have regular contact with Marshall.

After a contested hearing, the court terminated reunification services to both parents and set a permanency planning hearing under section 366.26. Peter challenged this ruling in a writ petition, claiming he should have been offered an additional six months of services, but we denied the petition on the merits (*Peter R. v. Superior Court* (July 19, 2006, A114100) [nonpub. opn.]), and the matter proceeded to a contested section 366.26 hearing on September 13, 2006.

The Department recommended a permanent plan of adoption and termination of all parental rights. Marshall's grandparents were committed to providing a safe and stable home for him, and he was continuing to do well in their care. Marshall had recently begun working with a therapist, however, to address symptoms of post-traumatic stress, which the therapist attributed to "the instability, neglect and violence" he experienced while in parental custody. Although the child cared about his parents and benefited from consistent contact with them, the therapist believed it was "imperative that he be kept in a stable, positive environment," which adoption by the grandparents would provide. The therapist also expressed concern about animosity Lori and Peter had been showing the grandmother. She believed adoption would ease the tension because the

parents "could focus their energy on supporting Marshall rather than fighting the courts." She felt guardianship would fuel the present animosity "by encouraging [the parents] to continue fighting for custody." After the grandmother reported that Lori and Peter were hostile to her when she supervised a visit, Department social workers held a meeting with the parents, the grandmother and Marshall's therapist in an attempt to promote improved communication and explore the appropriateness of guardianship versus adoption as a permanent plan. The Department reported "it became clear" to social workers at the meeting that guardianship would not ease, and could increase, the tension between Peter and his mother. Adoption was recommended because it offered the most stable environment for Marshall and would allow the family to shift from arguing about custody to meeting the child's needs. Both Marshall's court-appointed counsel and CASA agreed with this recommendation. The Department of Social Services also recommended implementing a plan of adoption. The grandparents demonstrated good parenting practices and the capability to meet Marshall's needs, and a preliminary assessment indicated they were suitable for adopting the child. CASA expressed the opinion that Marshall would have been more severely traumatized by his parents' circumstances if not for the stability provided by his grandparents.

Peter testified at the section 366.26 hearing that he and Marshall shared a special bond and his son needed him. He believed it would hurt Marshall to lose him as a father. On cross-examination, Peter was shown a letter from his mother indicating she intended to allow both parents to continue weekend visitation with Marshall. When she was invited to make a statement to the court, the grandmother said she loved her son and grandson and also cared about Lori, and she had "no intention of hurting Marshall by denying him access to anybody in his family."

At the close of the hearing, the court adopted the findings in the Department's report, terminated parental rights and ordered adoption as the permanent plan for Marshall. Remarking this was a "difficult case" because it was clear the parents loved their son, the court concluded the child's interest in stability required that he be released for adoption. The court specifically observed that the beneficial relationship exception to

termination of parental rights (§ 366.26, subd. (c)(1)(A)) did not apply. Even if the parents' visitation was sufficiently consistent (and the court questioned whether it was), the parents failed to meet the second requirement of having served regularly as the child's care provider in a "day-to-day parental relationship." The court concurred in the Department's conclusion that guardianship was less attractive than adoption because it would leave Marshall "in more limbo, not clear about who was necessarily running the ship," both now and in his adolescent years. This appeal followed.

**DISCUSSION**

Both parents assert the juvenile court erred in refusing to apply the beneficial relationship exception to termination of parental rights. (§ 366.26, subd. (c)(1)(A).) They contend they had significant relationships with Marshall, and they argue guardianship, not adoption, should have been ordered as his permanent plan. Although several courts have reviewed such decisions for substantial evidence (e.g., *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576-577), we have held that abuse of discretion is the appropriate standard of review. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)[4] Under this standard, " ' "a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." ' [Citations.] . . . 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citation.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

At a permanency planning hearing, the juvenile court must choose the appropriate long-term placement for a minor child. (See § 366.26, subd. (b)(1)-(4) [alternative placement options include adoption, guardianship and long-term foster care].) Adoption

[4] As we observed in *Jasmine D.*, the practical differences between these two standards of review are minor, and our evaluation of the factual basis of the court's exercise of discretion is similar to substantial evidence review. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

is the permanent plan preferred by the Legislature because it gives the child the best chance for a stable, permanent home with a responsible caretaker. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1348.) If the juvenile court finds a child adoptable, it must terminate parental rights and order the child placed for adoption unless the court determines that termination would be detrimental to the child due to any of four specified circumstances. (§ 366.26, subd. (c)(1)(A)-(D)). The first of these, and the only one at issue in this case, provides an exception when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) The parent has the burden of proving termination would be detrimental to the child under this exception. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1350.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1350.)

We are not presented with such an extraordinary case here. With respect to the first requirement of regular visitation and contact, the juvenile court observed that the parents' visitation with Marshall was arguably "not as regular as it should be" for the beneficial relationship exception to apply. Although Lori characterizes this comment as "mystifying," the record supports the court's finding. A visitation record for January through March 2006 indicated that on five separate occasions neither parent arrived for the scheduled visit or called ahead to cancel. Two other visits were cancelled after Peter called but did not arrive on time for the visit. In the next three months, visitation remained sporadic. According to a CASA case supervisor's report, between April and July 2006, Peter attended only 14 of the 28 possible visits offered and Lori attended only nine. Peter called ahead for most of his cancellations, but Lori rarely called ahead to cancel the visits she missed. On five occasions, both parents missed a scheduled visit and did not call ahead. The adoption assessment noted that Marshall felt "very disappointed" when his parents did not arrive for visits. Neither parent's visitation here rose to the level

of consistency demonstrated in published cases. For example, in *Beatrice M.*, the mother lived in an apartment downstairs, visited her children daily and took care of them on occasion. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416-1417.) In *Jerome D.*, a rare case in which the beneficial relationship exception did apply, the child had been having unsupervised overnight visits in his mother's home and expressed a strong desire to live with her. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207.) Neither parent in this case progressed beyond supervised visitation with Marshall.

The record also amply supports the trial court's conclusion that the parents lacked a beneficial parent-child relationship significant enough to outweigh the strong legislative preference for adoption. (See *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) Some factors that have been identified for determining whether a relationship is important and beneficial include: (1) the child's age; (2) the portion of the child's life spent in parental custody; (3) the positive or negative effect of interactions between parent and child; and (4) the child's particular needs. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467; *In re Jerome D.*, *supra*, 84 Cal.App.4th at p. 1206.) The parents point out that Marshall spent the first five of his seven years with them, and both social workers and the grandmother recognized the value of Marshall's continued contact with them. Marshall said he missed his parents, cared deeply about them and wanted to live with them, and his grandmother believed he had a "high degree of bonding and comfort" with Peter. At the same time, however, evidence presented to the court showed Marshall looked to his grandparents as parental figures. The state adoption assessment noted Marshall had a "very good relationship" with his grandparents: "He clearly loves them, trusts them, and considers them to be his primary caretakers."

"Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.]" (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) To satisfy the beneficial relationship exception, courts have consistently required the parent to have continued or developed a parental relationship with the child, not merely a

friendly or loving one. (See, e.g., *In re Angel B.*, *supra*, 97 Cal.App.4th at p. 468 ["for the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt"]; *In re Brittany C.* (1999) 76 Cal.App.4th 847, 854 ["While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent"].) There is no evidence in the record indicating either parent had maintained a parental relationship with Marshall as of the time of the section 366.26 hearing. Indeed, it is difficult to imagine how they might have done so in light of the fact that all of their visits with the child were supervised. As one court noted, the beneficial relationship envisioned by the exception is "a relationship characteristically arising from day-to-day interaction, companionship and shared experiences." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Showing that such a relationship exists is difficult if the parents have not advanced beyond supervised visitation. (See *ibid.*) However, as we stated in *Jasmine D.*, "a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent." (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

Finally, given the facts regarding visitation and the nature of the parent-child relationship, a court considering the beneficial relationship exception must determine whether "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The juvenile court performed this balancing and concluded that, while Marshall had an "important relationship" with his parents and "would benefit from not losing anyone in his life that he cares about and loves," adoption was still the best permanent plan because guardianship would leave him "in limbo," without adequate stability both

now and in the future as he grew into adolescence. This conclusion was consistent with the recommendations of the Department, CASA, Marshall's appointed counsel and, perhaps most significantly, Marshall's therapist. The grandmother wrote a letter to the court explaining Marshall's distress about his long-term placement and his "need[] to know where he will be permanently so he can settle in and feel secure," and his therapist told the court it was "imperative that he be kept in a stable, positive environment" such as the grandparents were providing. The Department explored guardianship as an alternative to terminating parental rights, but rejected the idea after it became clear in a meeting with the parents and grandmother that guardianship would only increase family tension over Marshall's custody. Guardianship is a disfavored option that "falls short of the secure and permanent placement intended by the Legislature." (*Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251.) Given Marshall's special need for permanence and stability, the court did not abuse its discretion in choosing adoption as the permanent plan.

**DISPOSITION**

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Parrilli, J.

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Siggins, J.